No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCT. 2, 2017
CERTIORARI GRANTED JAN. 12, 2018

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The following decisions have been omitted in printing the joint appendix because they appear in the appendix to the petition for certiorari, beginning on the following pages:

Opinion of the Supreme Court of South Dakota (Sept. 13, 2017) 1a

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The following relevant pleadings have been omitted in printing the joint appendix because they appear in the appendix to the brief in opposition, beginning on the following pages:

Defendants' Statement of Material Facts (S.D. Cir. Ct. Feb. 22, 2017) A-1

Plaintiff's Response to Defendants' Statement of Material Facts (S.D. Cir. Ct. Feb. 23, 2017) B-1

Supreme Court of South Dakota

No. 28160

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants and Appellees.

DOCKET ENTRIES

Doc #	Date	Actions
001	03/10/2017	Certified Copy of NOTICE OF APPEAL, P/S 3/8/17 (Odyssey and mail) (filed in TC 3/8/17) (AB due 4/24/17, if no trans ordered)
		* * *
014	04/13/2017	APPELLANT'S BRIEF (w/ cert of comp), P/S 4/13/17 (email) (RB due 5/31/17)
		* * *
015	06/14/2017	APPELLEE'S BRIEF (w/ cert of comp), P/S 6/14/17 (email) (Req for Oral Arg) (ARB due 7/5/17)
016	06/22/2017	APPELLANT'S REPLY BRIEF (w/ cert of comp), P/S 6/22/17 (email)
		* * *
020	08/29/2017	CALLED ON MERITS, ARGUED BY COUNSEL AND TAKEN UNDER ADVISEMENT

Doc #	Date	Actions
021	09/13/2017	Affirmed, Severson, Justice. Gilbertson, Chief Justice, and Zinter and Kern, Justices and Wilbur, Retired Justice, concur.
022	09/13/2017	JUDGMENT
		* * *
024	09/22/2017	LETTER dated 9/15/17 requesting the Court to correct a minor, but significant, technical error in the opinion issued 9/13/17 (Response due 10/12/17)
		* * *
026	10/30/2017	ORDER DENYING APPELLEES' REQUEST FOR CORRECTION OF THE OPINION
		* * *

South Dakota Sixth Judicial Circuit Court

No. 32CIV16-000092

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.

DOCKET ENTRIES

Events and Hearings

04/28/2016	COMPLAINT WITH ATTACHMENTS
04/28/2016	APPLICATION FOR PRELIMINARY INJUNCTION ORDER WITH ATTACHMENT
	* * *
05/19/2016	PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE RE: SYSTEMAX INC AND CERTIFICATE OF SERVICE
05/25/2016	NOTICE OF FILING OF NOTICE OF REMOVAL AND CERTIFICATE OF SERVICE WITH ATTACHMENTS
01/19/2017	ORDER AND OPINION GRANTING PLAINTIFF'S MOTION TO REMAND TO STATE COURT (FEDERAL COURT)
	* * *
02/21/2017	ANSWER JOINT ANSWER OF DEFENDANTS WAYFAIR INC, OVERSTOCKCOM INC AND NEWEGG INC AND CERTIFICATE OF SERVICE

02/21/2017	STATEMENT PARTIES' JOINT STATEMENT REGARDING PROCEEDINGS FOLLOWING REMAND AND CERTIFICATE OF SERVICE WITH ATTACHED EXHIBITS
02/22/2017	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/22/2017	DEFENDANT'S STATEMENT OF MATERIAL FACTS AND CERTIFICATE OF SERVICE
02/22/2017	DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/23/2017	PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
02/23/2017	PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AND CERTIFICATE OF SERVICE
02/24/2017	DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE
03/06/2017	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

03/07/2017	NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE WITH ATTACHMENT
03/08/2017	NOTICE OF APPEAL
03/08/2017	PLAINTIFF'S AND APPELLANT'S DOCKETING STATEMENT

* * *

U.S. District Court for the District of South Dakota

No. 3:16-cv-03019

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.

DOCKET ENTRIES

Date Filed	#	Docket Text
05/25/2016	1	NOTICE OF REMOVAL by Newegg Inc., Overstock.com, Inc., Wayfair Inc. from Circuit Court of the Sixth Judicial Circuit in Hughes County, South Dakota, case number 32CIV16-000092. (Attachments: # 1 Ex. A – State Court Documents, # 2 Ex. B – State Court Documents, # 3 Ex. C – State Court Documents, # 4 Ex. D – Notice of Filing Notice of Removal) (JLS) (Entered: 05/25/2016)
		* * *
05/25/2016	7	*Joint* ANSWER to Complaint by Newegg Inc., Overstock.com, Inc., Wayfair Inc.. (Bratkiewicz, Jeffrey) (Entered: 05/25/2016)
		* * *
07/22/2016	21	MOTION to Remand to State Court by State of South Dakota. (Jasper, Kirsten) (Entered: 07/22/2016)

Date Filed	#	Docket Text
07/22/2016	22	MEMORANDUM in Support re 21 MOTION to Remand to State Court filed by State of South Dakota. (Jasper, Kirsten) (Entered: 07/22/2016)
07/22/2016	23	STATEMENT OF MATERIAL FACTS by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. (Bratkiewicz, Jeffrey) (Entered: 07/22/2016)
07/22/2016	24	BRIEF by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. *IN SUPPORT OF DEFENDANTS' 25 MOTION FOR SUMMARY JUDGMENT* (Bratkiewicz, Jeffrey) Modified on 7/25/2016 to link document (SKK). (Entered: 07/22/2016)
07/22/2016	25	MOTION for Summary Judgment *AND REQUEST FOR ORAL ARGUMENT* by Newegg Inc., Overstock.com, Inc., Wayfair Inc.. (Bratkiewicz, Jeffrey) (Entered: 07/22/2016)

Date Filed	#	Docket Text
08/12/2016	26	MEMORANDUM in Opposition re 21 MOTION to Remand to State Court filed by All Defendants. (Attachments: # 1 Exhibit ACMA State Court Lawsuit Complaint for Declaratory Judgment, # 2 Exhibit State Court Lawsuit Answer of the South Dakota Department of Revenue) (Bratkiewicz, Jeffrey) (Entered: 08/12/2016)
08/12/2016	27	RESPONSE to Motion re 25 MOTION for Summary Judgment *AND REQUEST FOR ORAL ARGUMENT* filed by State of South Dakota. (Jasper, Kirsten) (Entered: 08/12/2016)
08/12/2016	28	RESPONSE to 23 Statement of Material Facts filed by State of South Dakota. (Jasper, Kirsten) (Entered: 08/12/2016)
08/26/2016	29	REPLY BRIEF by Defendants Newegg Inc., Overstock.com, Inc., Wayfair Inc. in Support of 25 *Defendant's Motion for Summary Judgment* (Bratkiewicz, Jeffrey) Modified on 8/29/2016 to link document and add text (SKK). (Entered: 08/26/2016)
08/26/2016	30	REPLY to 26 Memorandum in Opposition to Motion, filed by State of South Dakota. (Williams, Richard) (Entered: 08/26/2016)

Date Filed	#	Docket Text
		* * *
12/08/2016	36	Motion Hearing held on 12/8/2016 re 21 MOTION to Remand to State Court filed by State of South Dakota before U.S. District Judge Roberto A. Lange (Court Reporter Jill Connelly) (SLW) (Entered: 12/08/2016)
		* * *
01/17/2017	38	ORDER AND OPINION granting 21 Motion to Remand to State Court. Certified copy of Order and Opinion mailed to Hughes County Clerk of Courts. Signed by U.S. District Judge Roberto A. Lange on 1/17/17. (DJP) (Entered: 01/17/2017)

Date Filed	#	Docket Text
02/02/2017	39	TRANSCRIPT of Proceedings re 36 Motion Hearing held on 12-8-2016 before Judge Roberto A. Lange. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/23/2017. Redacted Transcript Deadline set for 3/6/2017. Release of Transcript Restriction set for 5/4/2017. (Connelly, Jill) (Entered: 02/02/2017)
02/02/2017	40	NOTICE of Filing of Official Transcript re 36 Motion Hearing. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 02/02/2017)

STATE OF SOUTH DAKOTA	) : ss)	IN CIRCUIT COURT
COUNTY OF HUGHES		SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

WAYFAIR INC
4 Copley PL FL 7
Boston MA 02116-6504

SYSTEMAX INC
11 Harbor Park Dr
Port Washington NY 11050

OVERSTOCK.COM INC
6350 S 3000 E
Salt Lake City UT 84121-5952

NEWEGG INC
16839 E Gale Ave
City of Industry CA 91745
Defendants.

32 Civ. 16-92
COMPLAINT

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State – through this declaratory judgment action – seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a

declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a

bright-line rule in this area and the doctrine and principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power

"to regulate Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If – as is quite often the case – Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.") (citation omitted).

9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes . . . it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq*. The Secretary of the Department is

charged with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 13, 743 N.W.2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action. Accordingly,

the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions . . . to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice

directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (citation omitted) (setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who – because of their limited size or geographic reach – conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability – retroactive or otherwise – during the pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax

on a voluntary basis."* *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it

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* The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers . . . is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study

conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and

growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

47. This development is further supported by the Streamlined Sales and use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs) with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

48. The Legislature also found that *Bellas Hess* and *Quill* distort the local retail market, causing unfairness to brick-and-mortar retailers generally, and to smaller, locally owned businesses in particular. Out-of-state retailers benefit from local infrastructure without paying their fair share of taxes. *See* S.B. 106 § 8(5). And they also "actively market sales as tax free or no sales tax transactions" even though "a use tax is owed" by the consumer. *Id.* § 8(3). As a result, local retailers are unable to compete fairly with online retailers, which is likely to cause even further harm to the State by harming the local businesses that employ local residents and make up the bulk of the State's tax base. *See id.* § 8(4) ("The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.").

49. Well-documented economic effects support the Legislature's judgment. Expert economists, including researchers associated with both sides of the political spectrum, agree that the special exemption from sales taxation created by *Quill* causes serious harm to state economies (and the national economy) by distorting

the operation of the free market. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote

> sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act – a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action – reflecting on the record the automatic effect of Section 3 of the Act – and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

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[Appendices to Complaint omitted]